



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 2 OF 2013

1. MOHAMMED JUMA MOHAMED

2. ATHUMANI RASHID NGARE.....PETITIONERS

VERSUS

1. REGISTRAR OF TITLES, COAST REGION KILIFI

2. COMMISSIONER OF LANDS

3. ATTORNEY GENERAL.....RESPONDENTS

RULING

Introduction:

1. This suit was commenced by way of a Petition dated 21st February 2013.
2. The Petitioners have filed an Application dated 3rd November 2014 seeking for the following orders.

(a) That the Land Registrar, Kilifi County be ordered to prepare all the necessary documents, including the amendment of the Registry Index Map of Roka/Uyombo, so as to register the Petitioners herein MOHAMED JUMA MOHAMED and ATHUMANI RASHI NGARE as the proprietors of the suit property popularly referred to as all that piece of land running parallel to plot No. Roka Uyombo/495 and 500 on one side and the Indian Ocean on the other measuring 7.58 acres of land. The said process to be completed within a period of 30 days.

(b) That the costs be in the cause.

3. The Application is premised on the grounds that pursuant to an order of this court dated 27th May, 2014, the suit property was surveyed by the Kilifi County Surveyor and a report to that effect was filed in court; that the Petitioners have always been in possession of the suit property and that it is only fair that the Petitioners be registered as the proprietors of the suit property which is their constitutional right.
4. The Respondents, through the Attorney General, filed their Grounds of Opposition in which they averred that if the Application is granted, the order will be in breach of Rule 110 of the Survey Regulations; that it is apparent that this court has no jurisdiction to issue the prayers sought and

- that the orders sought in the Application are final and will prejudice the Respondents because the main Petition is still pending.
5. The Petitioners' counsel appeared before me and submitted that pursuant to the order of this court, a surveyor visited the suit property and confirmed that the Petitioners herein are in occupation of the suit property measuring 7.258 acres; that the Petitioners have been living on the suit property for more than 40 years and that the Government having promised to issue to its citizen more than 3,000,000 titles, it should issue to the Petitioners with the title deed in respect to the suit property.
 6. Counsel submitted that when the court ordered the surveyor to survey the suit property, it did so to achieve a certain objective and that court orders are never issued in vain.
 7. Counsel submitted that if the Application is allowed, the court would have met its overriding objective of dealing with matters expeditiously.
 8. The Respondents' counsel submitted that the Report by the surveyor is in breach of Rule 110 of the Surveyor's Regulation because the said land is within 60 metres of the High Water Mark.
 9. Counsel submitted that the process of allocating public land is provided for in section 12 of the Land Act and consequently the court has no jurisdiction to allocate to the Petitioners the suit property.
 10. The record shows that on 9th May 2013, the parties agreed to have the Petition heard by way of affidavit evidence. However, on 18th February 2014, the court ordered that the matter should proceed by way of viva voce evidence.
 11. The Petitioner's advocate then filed an Application dated 1st April 2014 in which they sought an order that the County Surveyor of Kilifi do visit the suit property and prepare a report in respect of the suit property. The court allowed the said Application.
 12. Consequently, the County Surveyor visited the suit and prepared a report dated 14th July 2014 which has been annexed on the Application.
 13. In the report, the surveyor attached a sketch map "showing all that piece of land running parallel to plot No. Roka/uyombo/495 and 500 on one side and the Indian Ocean on the other side measuring 7.58 acres (3.07 HA) but not 11.5 Acres."
 14. It is on the basis of that report that the Petitioners are seeking for an order compelling the Respondents to prepare all the necessary documents, and to register the Petitioners as the proprietors of the suit property.
 15. The orders being sought in the current Application are the same orders that the Petitioners have sought in the Petition.
 16. The report filed by the surveyor in this court in respect of the suit property has not been interrogated by the Respondents.
 17. The report by the Surveyor can only be used in evidence during the hearing of the Petition. The report cannot in itself be conclusive proof that the Petitioners are entitled to the suit property before interrogating the Petitioners and the surveyor's evidence during the hearing of the Petition.
 18. In view of the fact that the Petitioners must prove their case on a balance of probabilities, the orders being sought in the Application are final in nature and can only be granted once the Petition is heard. Whatever information the surveyor provided to the Petitioners has to be produced in evidence during the hearing of the Petition. The Petitioners' right to the suit property can only be determined at that stage.
 19. In the circumstances, I dismiss the Petitioners' Application dated 3rd November 2014 with no orders as to costs.

Dated and delivered in Malindi this 17th day of April, 2015.

O. A. Angote

Judge